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No. 91-1379

In the Supreme Court of the United States

OCTOBER TERM, 1991

LLOYD PITTMAN, JR., ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Tort Claims Act's discretionary function exception, 28 U.S.C. 2680(a), bars a suit alleging that the Army Corps of Engineers failed to provide adequate lightning protection when it constructed a comfort station at a federal recreational property.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A2) is unreported, but it is noted at 949 F.2d 1163 (Table). The opinion of the district court (Pet. App. A3-A5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1991. The petition for a writ of certiorari was filed on February 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On May 16, 1988, petitioner Lloyd Pittman, Jr., was seriously injured when lightning struck a tree and flashed over to a comfort station he was using at Cool Branch Park, a federal recreational property located on the Chattahoochee River near Georgetown, Georgia. The Army Corps of Engineers designed and erected the structure in the early 1960s. The Corps' design and construction did not violate any federal statutes, regulations, policies, or required safety codes. No other Corps buildings in the area have lightning protection devices. Pet. App. A3-A4.

Petitioner and his father brought this action against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, alleging that the Corps was negligent because it failed to install a lightning rod on the comfort station and that the Corps' negligence was the cause of petitioner's injuries. The United States moved to dismiss the complaint on the ground that the FTCA's discretionary function exception, 28 U.S.C. 2680(a), bars a negligence suit based on the Corps' design and selection of safety features. Petitioners responded that the discretionary function exception was not applicable because the Corps had never actually considered whether to install a lightning rod and therefore did not in fact exercise discretion.

The district court rejected petitioners' argument and dismissed their complaint. Pet. App. A3-A5. The court concluded that "the Corps of Engineers conduct in designing and building outhouses involves the permissible exercise of policy judgment which would encompass any decision made by the Corps of Engineers concerning whether to install lightning rods or electrical grounds." *Id.* at A4. The court of appeals affirmed that decision without an opinion. *Id.* at A1-A2.

ARGUMENT

1. This Court's decision in *Berkovitz* v. *United States*, 486 U.S. 531 (1988), established a two-part test for applying the discretionary function exception. A court must "first consider whether the action is a matter of choice for the acting employee." *Id.* at 536. If the employee is required to follow a course of action that is specifically prescribed by a federal statute, regulation, or policy, the discretionary function exception does not apply. *Ibid.* If the challenged conduct involves an element of judgment, then the court must additionally determine whether the challenged conduct is of the kind that the discretionary function exception was designed to shield. *Ibid.* "The focus of the inquiry is * * * on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States* v. *Gaubert*, 111 S. Ct. 1267, 1275 (1991).

The Corps' selection of lightning protection features for its facilities is a "matter of choice." No federal statutes, regulations, policies, or required safety codes mandate the installation of lightning protection devices. Pet. App. A4. Additionally, the selection of safety features for federal structures is the type of discretionary decision that is "susceptible to policy analysis." The decision to install appropriate lightning protection devices to federal facilities requires a weighing of social costs and benefits, including assessment of factors such as the probability that lightning might strike the structure, the effectiveness of the safety device, and the costs of design and installation. The courts below therefore correctly held that the discretionary function exception applies to this case and bars this lawsuit. See, *e.g.*, *United States* v. *Varig Airlines*, 467 U.S. 797, 820 (1984).

2. Petitioners contend (Pet. 6) that the discretionary function exception does not protect the United States from liability if the government agents have not actually

considered the specific safety device at issue. That contention, however, is inconsistent with the explicit language of the exception, which bars liability based on a "failure to * * * perform" a discretionary function. 28 U.S.C. 2680(a). If the consideration of safety matters in the design and construction of a public facility is a decision "grounded in social, economic, and political policy" that is protected under the exception, *United States* v. *Gaubert*, 111 S. Ct. at 1273, then the "failure to" consider such safety devices is also protected under the exception.

The FTCA's discretionary function exception bars suits based on matters involving policy judgments. It does not depend on whether the government explicitly makes such a judgment. As this Court noted in *Dalehite* v. *United States*, 346 U.S. 15, 36 (1953) (quoted with approval in *Berkovitz*), "[w]here there is room for policy judgment and decision there is discretion." Thus, "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts * * * are of the nature and quality that Congress intended to shield from tort liability." *United States* v. *Varig Airlines*, 467 U.S. 797, 813 (1984). Accordingly, " 'the relevant question is not whether an explicit balancing is proved, but whether the decision is susceptible to policy analysis.' *United States Fidelity & Guar. Co.* [v. *United States*, 837 F.2d 116], 121 [(3d Cir.), cert. denied, 487 U.S. 1235 (1988)]." *In re Joint Eastern & Southern Districts Asbestos Litigation*, 891 F.2d 31, 37 (2d Cir. 1989). Accord *United States* v. *Gaubert*, 111 S. Ct. at 1275.

Petitioners do not dispute that the government's design and construction of public facilities on public lands—and specifically, the government's determinations whether to incorporate safety devices—involve matters where "there is room for policy judgment and decision." Because those determinations are protected

by the discretionary function exception, the failure to make them is similarly protected.

3. Contrary to petitioners' claims, there is no conflict among the circuits on the question petitioners present. The courts of appeals are in agreement that the discretionary function exception encompasses a failure "to even consider" (Pet. 6) a matter of policy. See, *e.g.*, *In re Joint Eastern & Southern Districts Asbestos Litigation*, 891 F.2d at 37 ("it is unimportant whether the government actually balanced economic, social, and political concerns in reaching its decision"); *United States Fidelity & Guaranty Co.* v. *United States*, 837 F.2d 116, 120-121 (3d Cir.), cert. denied, 487 U.S. 1235 (1988) (where the subject matter of the activity involves policy considerations, "it is irrelevant whether the government employee actually balanced economic, social, and political concerns in reaching his or her decision"); *Allen* v. *United States*, 816 F.2d 1417, 1422 n.5 (10th Cir. 1987), cert. denied, 484 U.S. 1004 (1988) (it is "irrelevant whether the alleged failure to warn was a matter of 'deliberate choice,' or a mere oversight").[1]

Petitioners attempt to find support for a contrary result in First Circuit precedent. Pet. 9-11. The First Circuit follows the approach of the other courts of appeals. Thus, "where the government is involved in regulating private conduct and protecting the public from danger, 'the government's failure to consider to undertake a greater level of care generally remains within the exception." *Irving* v. *United States*, 909 F.2d 598, 602-603

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[1] See also, *e.g.*, *In re Ohio River Disaster Litigation*, 862 F.2d 1237, 1247 (6th Cir. 1988), cert. denied, 493 U.S. 813 (1989), and *Myslakowski* v. *United States*, 806 F.2d 94, 97 (6th Cir. 1986), cert. denied, 480 U.S. 948 (1987) ("[e]ven the negligent failure of a discretionary government policymaker to consider all relevant aspects of a subject matter under consideration does not vitiate the discretionary character of the decision that is made").

(1990), quoting *Dube* v. *Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989). The court recognized a narrow departure for the general principle in *Dube*, stating that the United States could not rely on the discretionary function exception in operating an industrial shipyard without an affirmative exercise of policy judgment, because it was "operating in a capacity so highly analogous to private industry." 870 F.2d at 799. The court made clear, however, that an affirmative exercise of policy judgment is not required in the usual situation where the government performs "a traditional governmental function." 870 F.2d at 798. In this case, the government was engaged in the "traditional governmental function" of providing recreational facilities on public lands, and hence the decision here does not conflict with *Dube*. See also *Irving*, 909 F.2d at 602-603.[2]

Petitioners also attempt to find support in Ninth Circuit precedent. Pet. 11-12. The Ninth Circuit, however, follows the decisions of the other circuits in holding that an affirmative exercise of discretion is not required. See *Richardson* v. *United States*, 943 F.2d 1107, 1111 (9th Cir. 1991), cert. denied, 112 S. Ct. 1473 (1992), and *Kennewick Irrigation District* v. *United States*, 880 F.2d 1018, 1028 (9th Cir. 1989) (if decisions are the type grounded in social, economic, or political policy, the government need not "prove that it considered these factors and made a conscious decision on the basis of them"); *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 998-999 (9th Cir. 1987), cert. denied,

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[2] Petitioners misinterpret (Pet. 11) the significance of the First Circuit's decision in *Irving*. The court stated that the case did not involve a failure to make a policy decision. Instead, the issue was whether "OSHA compliance officers negligently failed to meet the level of care OSHA had set." 909 F.2d at 603.

485 U.S. 905 (1988) (failure to consider whether to issue warning falls within discretionary function exception).

The cases that petitioner cites, *Earles* v. *United States*, 935 F.2d 1028 (9th Cir. 1991), and *Summers* v. *United States*, 905 F.2d 1212 (9th Cir. 1990), are not to the contrary. In *Earles*, the majority cited *Kennewick* with approval, implicitly rejecting Judge Pregerson's dissenting view that the discretionary function exception should not apply in the absence of a conscious decision. 935 F.2d at 1032 (applying the discretionary function exception to the Suits in Admiralty Act). In *Summers*, the Ninth Circuit reasoned that the agency's failure to implement safety measures was "a departure from the safety considerations established in [Park] Service policies" and, accordingly, there was no conflict with *Kennewick* or *Consolidated Testing*. 905 F.2d at 1216.[3]

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[3] Petitioners also contend, Pet. 8-9, that the Eleventh Circuit's decision in this case conflicts with a prior decision by that court, *Alabama Electric Cooperative, Inc.* v. *United States*, 769 F.2d 1523 (1985). That alleged intra-circuit conflict, however, does not provide a justification for review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, there is no such conflict. The issue in *Alabama Electric* was simply whether particular design decisions were grounded in social, economic, or political policy, and the court remanded for further consideration of the facts of the case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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